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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/049,876	06/07/2002	William F. Aftora	WFA-1400	6290
23575	7590	07/19/2006	EXAMINER	
CURATOLO SIDOTI CO., LPA 24500 CENTER RIDGE ROAD, SUITE 280 CLEVELAND, OH 44145			BECKER, DREW E	
			ART UNIT	PAPER NUMBER
			1761	
DATE MAILED: 07/19/2006				

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action  
Before the Filing of an Appeal Brief**

Application No.

10/049,876

Applicant(s)

AFTOORA, WILLIAM F.

Examiner

Drew E. Becker

Art Unit

1761

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 03 July 2006 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 4 months from the mailing date of the final rejection.  
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: \_\_\_\_\_.  
Claim(s) objected to: \_\_\_\_\_.  
Claim(s) rejected: \_\_\_\_\_.  
Claim(s) withdrawn from consideration: \_\_\_\_\_.

**AFFIDAVIT OR OTHER EVIDENCE**

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.


**REQUEST FOR RECONSIDERATION/OTHER**

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). \_\_\_\_\_.  
13. ☐ Other: \_\_\_\_\_.

  
DREW BECKER  
PRIMARY EXAMINER

7-17-06

Continuation of 11. does NOT place the application in condition for allowance because: Applicant argues that "gelled edible starchy material" was supported by the specification. However, applicant cannot point out a single instance where this phrase is used in the application. In fact, applicant cannot point out a single use of the term "gelled" in the specification. It is certainly possible that the starch gelled, but it is not an indisputable truth. It is possible that the claimed combination of ingredients could have affected the structure of the final product without this transformation occurring. Applicant argues that WO 96/29894 does not teach a gelled product. This line of reasoning confuses the examiner since on one hand, the applicant is arguing that the application inherently disclosed gelling, while on the other arguing that the cited references could not possibly include gelling as an inherent property, even though the same heating conditions are applied. Regardless, WO 96/29894 specifically states that "Some gelling might have taken place during the preparation of the sauce base, e.g. upon its pasteurization" (page 6, line 15). It is interesting to note that this citation is directly between the two citations mentioned by applicant. Applicant argues that WO 96/29894 does not teach a gelled starch. However, WO 96/29894 clearly teaches that the starch is heated at 70-100 C during the mixing step (page 8, line 12) which would provide gelation. Regarding page 6 of WO 96/29894, this page merely discloses that the starch should not be a pre-gelatinized starch. It does not exclude gelatinization during the preparation of the food product. Applicant argues that WO 96/29894 did not teach a solid food product. However, WO 96/29894 clearly teaches that the food product can be in the form of a dry powder (page 8, line 25) and that the food may also possess a spoonable, mousse-like structure (page 9, lines 1-10). In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, WO 96/29894 is directed to a food product which can be prepared to resemble mousse in structure by the addition of gases such as carbon dioxide (page 9, lines 1-10). WO 96/29894 does not provide any specific examples of how to achieve this gas incorporation. Gimelli et al is directed to a food product comprising sodium bicarbonate which provided beneficial PH buffering and thereby controlled the palatability of the sauce (column 3, lines 24-45). It would have been obvious to one of ordinary skill in the art to incorporate the sodium bicarbonate of Gimelli et al into the invention of WO 96/29894 since both are directed sauce products, since WO 96/29894 already included the addition of carbon dioxide (page 9, lines 1-9) but simply does not explain how it was achieved, since WO 96/29894 already included acidic ingredients such as wine and citric acid (page 4, lines 26-36), since sodium bicarbonate was well known to produce carbon dioxide in foods, and since Gimelli et al teach that sodium bicarbonate was also an effective PH buffer in sauces in order to provide a neutralized pH of 4-7 (column 3, lines 24-45). In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

  
DREW BECKE  
PRIMARY EXAMINER  
7-17-06